CITITOWER SDN BHD v. PEMUNGUT DUTI SETEM

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[ORIGINATING SUMMONS NO: WA-24-5-01-2016]
6 JULY 2017

LAND LAW: *Transfer – Memorandum of transfer – Parties entered into sale of business agreement – Sale of business agreement exempted from stamp duty but memorandum of transfer under agreement not exempted – Whether subsidiary documents accessory to primary agreement exempted – Whether memorandum of transfer exempted from ad valorem stamp duty – Stamp Act 1949, s. 15*

REVENUE LAW: *Stamp duty – Assessment – Parties entered into sale of business agreement – Sale of business agreement exempted from stamp duty but memorandum of transfer under agreement not exempted – Whether subsidiary documents accessory to primary agreement exempted – Whether memorandum of transfer exempted from ad valorem stamp duty – Stamp Act 1949, s. 15*

The plaintiff and AMSB had entered into a sale of business agreement ('the SBA') where the plaintiff agreed to acquire the business of AMSB ('the undertaking') which included all its assets and liabilities consisting cash, receivables, liabilities, other assets and a plot of land ('the land'). The defendant imposed a fixed duty of RM10 under item 4 of the First Schedule of the Stamp Act 1949 ('the Act') on the SBA. A memorandum of transfer ('the MOT') between the plaintiff and AMSB was later executed *via* Form 14A to effect the transfer of the land from the latter to the former. The plaintiff submitted an application for relief under s. 15 of the Act to the defendant but the defendant rejected the same. The plaintiff appealed against the rejection to the defendant's Jabatan Operasi Cukai, Unit Duti Setem but the appeal was rejected by the defendant. The defendant raised a notice of assessment for stamp duty for the sum of RM7,391,520 by applying *ad valorem* stamp duty under item 32 of the First Schedule of the Act. In assessing the stamp duty chargeable, the defendant valued the land at RM205,520,000. The purchase price of the business of AMSB was RM349,981,545 while RM174,400,000 was the amount in consideration for the said land. The plaintiff appealed to the defendant against the penalty and the defendant agreed to waive the penalty. Dissatisfied with the assessment made and having paid the duty accordingly, the plaintiff appealed against the assessment to the High Court and for that purpose, required the defendant to state and sign a case setting out the question on which the opinion was required. The defendant rejected the plaintiff's notice of objection and contended that the plaintiff was correctly assessed with *ad valorem* duty. Dissatisfied with the assessment made and having paid the duty accordingly, the plaintiff appealed against the assessment to the High Court. The question

A that arose before the High Court was whether the MOT was liable to *ad valorem* stamp duty under item 32, First Schedule of the Act or exempted from stamp duty under s. 15(1) of the Act. The defendant submitted that the SBA, being the primary instrument for the undertaking, was exempted under s. 15(1) but not the MOT, which was a subsidiary instrument to complete
B the undertaking.

Held (allowing application):

(1) There was no basis for the MOT to be assessed under *ad valorem* duty under item 32, First Schedule of the Act. (para 20)

C **(2)** By virtue of s. 4(3) of the Act, the MOT was also exempted from stamp duty. Where a document is exempt from stamp duty, all subsidiary documents accessory to the primary purpose are also exempt. Section 15(1) of the Act does not state that it is only the SBA that is exempt from stamp duty. Section 15(1) clearly states if the conditions are satisfied,
D then stamp duty under item 32(a) or (b) in the First Schedule shall not be chargeable on any instrument made for the purpose of or in connection with the transfer of the undertaking. (paras 12 & 13)

(3) Section 15(1) of the Act must be given the meaning on the basis of what was clearly said. There was no basis to imply anything into the
E provision or read anything else other than looking at the language used. Section 15(1) of the Act does not restrict the stamp duty exemption to one instrument only. It clearly says that any instrument liable to stamp duty under item 32(a) or (b) in the First Schedule shall not be chargeable to stamp duty. The MOT was ordinarily chargeable instrument under
F item 32(a). The word used by Parliament was 'any instrument'. This clearly envisaged one or more instrument and whether they were the instrument in question was the principal or secondary instrument. The MOT was not a stand-alone instrument. It was executed pursuant to the SBA. (paras 14, 15, 16 & 19)

G **Case(s) referred to:**

Cheah Choon Gan & Ors v. Registrar of Titles, Kedah [1972] 1 LNS 15 FC ***(refd)***

Clear Water Sanctuary Golf Management Berhad v. Ketua Pengarah Hasil Dalam Negeri (2014) MSTC 30-075 ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd (2015) MSTC 30-091 ***(refd)***

H *Saxone Lilley & Skinner (Holdings) Ltd v. Commissioner of Inland Revenue [1967] 44 TC 122* ***(refd)***

UMBC v. Pekeliling Triangle Sdn Bhd [1991] 2 CLJ 1470; [1999] 1 CLJ (Rep) 474 SC ***(refd)***

Legislation referred to:

I Stamp Act 1949, ss. 4(3), 15(1), 15A, 21, First Schedule items 4, 32(a), (b)

For the plaintiff - S Saravana Kumar; M/s Lee Hishammuddin Allen & Gledhill
For the defendant - Siti Salina Hassan; FC

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] In this application, the question for the opinion of this honourable court is whether the memorandum of transfer ("MOT") dated 31 December 2013 is liable to *ad valorem* stamp duty under item 32, First Schedule of the Stamp Act 1949 ("SA") or exempted from stamp duty under s. 15(1) of the SA.

Facts

[2] The facts of the case are as follows:

(a) on 22 November 2013, a sale of business agreement ("SBA") was executed between the plaintiff and AMSB. Pursuant to the agreement, the plaintiff has agreed to acquire the business of AMSB ("the undertaking") which includes, all its assets and liabilities consisting of cash, receivables, liabilities, other assets and a plot of land bearing the title Geran No. 43695, Lot 167 ("the land");

(b) the defendant had imposed fixed duty of RM10 under item 4 of the First Schedule of the SA 1949 on the sale of business agreement on 29 November 2013;

(c) on 31 December 2013, a MOT was executed between the plaintiff and AMSB *via* Form 14A to effect the transfer of the land from AMSB to the plaintiff;

(d) on 29 January 2014, the plaintiff submitted an application for relief under s. 15 of the SA 1949 ("the application") to the defendant through the defendant's Pejabat Pengarah Wilayah Persekutuan Putrajaya ("PPWPP"). On 9 April 2014, the defendant rejected the application *via* a letter dated 7 April 2014 ("PPWPP's rejection");

(e) the plaintiff subsequently submitted an appeal against the PPWPP's rejection *via* its appeal letters dated 5 May 2014 and 8 May 2014 to the defendant's Jabatan Operasi Cukai, Unit Duti Setem ("the appeal"). On 10 December 2014, the appeal was rejected by the defendant;

(f) on 1 March 2015, the defendant raised a notice of assessment for stamp duty for the sum of RM7,391,520 by applying the *ad valorem* duty under item 32 of the First Schedule of the SA 1949. In assessing the stamp duty

chargeable, the defendant valued the land at RM205,520,000. The purchase price of the business of AMSB is RM349,981,545, whereas RM174,400,000 was the amount in consideration for the said land.

A copy of the notice of assessment dated 1 March 2015 is enclosed and marked as "exh. AAAK7" in the plaintiff's affidavit in support;

(g) the plaintiff further appealed to the defendant *via* its letter dated 9 March 2015 against the penalty imposed by the defendant. The defendant had agreed to waive the penalty *vide* its letter dated 19 March 2015;

(h) on 13 January 2016, the plaintiff being dissatisfied with the assessment made and having paid the duty accordingly, appealed against the assessment to High Court *vide* an originating motion no. WA-24-5-01-2016, and for that purpose require the defendant to state and sign a case setting out the question on which the opinion was required;

(i) in the defendant's letter dated 23 December 2015 where the defendant rejected the plaintiff's notice of objection, the defendant contends that the plaintiff was correctly assessed with *ad valorem* duty under item 32, First Schedule of the SA 1949; and

(j) the plaintiff being dissatisfied with the assessment made and having paid the duty accordingly, appealed against the assessment to the High Court.

Issue

[3] The present case involves the interpretation of s. 15 of the Stamp Act 1949 ("SA") whether there is liable to *ad valorem* stamp duty under item 32, First Schedule of the SA or exempted from stamp duty under s. 15(1) of the SA.

Outline Of Submissions On The Challenge To The Impugned Decision

[4] The plaintiff's case is that it is entitled to be exempted from stamp duty pursuant to s. 15(1) of the SA. Further, the plaintiff contended that s. 15A of the SA provides relief to companies from stamp duty in case of transfer of property between associated companies. It was submitted for the plaintiff that the plaintiff and AMSB are both related companies and therefore the transfer of the said land between the plaintiff and AMSB would also be exempted from stamp duty pursuant to s. 15A of the SA.

[5] Therefore, the plaintiff argued that the defendant's decision to assess the plaintiff with *ad valorem* duty under item 32, First Schedule of SA is without factual and legal basis.

[6] The dispute between the parties is that the defendant claims that it is the sale of business agreement ("SBA") dated 22 November 2013 which is exempted and not the MOT dated 31 December 2013.

[7] Therefore, the question is which of the plaintiff's instrument is exempted?

[8] The defendant submitted that the said sale of business agreement ought to be imposed with *ad valorem* duty under s. 21 of the Stamp Act 1949 wherein items liable to duty are goodwill, receivables and deposit and the duty would be calculated based on item 32 (a) in the First Schedule of the Stamp Act 1949.

Decisions

[9] The relevant provision is s. 15(1) of the SA which provides:

> If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Collector that there exist the following conditions, that is to say:
>
> a) that a company with limited liability has been registered within six months before the commencement of this Act, or that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by special written law, or that since the commencement of this Act or within six months before the commencement thereof the nominal share capital of a company has been increased;
>
> b) that the company (in this section referred to as "the transferee company") is to be registered in Malaysia or has been incorporated in Malaysia or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per centum of the issued share capital of, any particular existing company;
>
> c) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per centum thereof:
>
> (i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company; or
>
> (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company;
>
> then, subject to this section, stamp duty under Item 32(a) or (b) in the First Schedule shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares.
>
> The proviso to Section 15(1) is not relevant for the purpose of this submission.

[10] The defendant does not dispute that the plaintiff had satisfied all the conditions under s. 15(1) of the SA.

[11] The defendant's contention appears to be that the MOT is a subsidiary instrument and the SBA is the primary instrument. Thus, according to the defendant, the SBA being the primary instrument for the undertaking is exempt under s. 15(1) but not the MOT which is a subsidiary instrument to complete the undertaking.

[12] If this is the case as alleged by the defendant, then by virtue of s. 4(3) of the SA, the MOT is also exempt from stamp duty. Where a document is exempt from stamp duty, all subsidiary documents accessory to the primary purpose are also exempt (see *Cheah Choon Gan & Ors v. Registrar of Titles, Kedah* [1972] 1 LNS 15; [1973] 1 MLJ 107).

[13] The defendant claims that the exemption is only for the SBA and not the MOT. However, s. 15(1) does not state that it is only the SBA is exempted from stamp duty. Section 15(1) clearly states if the conditions are satisfied, then stamp duty under item 32(a) or (b) in the First Schedule shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking.

[14] Section 15(1) must be given the meaning on the basis of what is clearly said. There is no basis to imply anything into the provision or read anything else other than looking at the language used. The Supreme Court in *UMBC v. Pekeliling Triangle Sdn Bhd* [1991] 2 CLJ 1470; [1999] 1 CLJ (Rep) 474 held that:

> The Stamp Act 1949, is an Act relating to stamp duties and, as Lord Tenterden has stated in *Tomkins v. Ashby* [1827] 6 B & C 541, 542:
>
> > Statutes imposing duties are to be so construed as not to make any instruments liable to them unless manifestly within the intention of the Legislature.
>
> The rules of construction of documents for stamp duty purposes and of stamp duty legislation are well summarised in the following passages from *Sergeant and Sims on Stamps Duties* (9th Edn.) at p. 18:
>
> (a) General rule of construction of charge
>
> It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, *Denn & Manifold v. Diamond* [1825] 4 B & C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous, *Daines v. Heath* [1847] 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favor of the liability, *Phillips v. Morrison* [1844] 13 LJ Ex 212, and see *R. v Winstanley* [1831] 1 Cr. & J 434.

(b) Ambiguity

If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favorable to the Crown and the other to the subject, then the latter construction should be adopted, *Clifford v. IRC* [1896] 2 QB 187, approved and followed in *Hennell v. IRC* [1933] 1 KB 415 CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt *R v Winstanley, supra.*

See: p. 9 at 12 and 13 of the plaintiff's bundle of authorities 2 ("PBA")

[15] It must be noted that s. 15(1) does not restrict the stamp duty exemption to one instrument only. It clearly says that any instrument liable to stamp duty under item 32(a) or (b) in the First Schedule shall not be chargeable to stamp duty. It is not in dispute that the MOT is ordinarily chargeable instrument under item 32(a).

[16] I agree with the plaintiff's submission that the word used by Parliament is any instrument. This clearly envisages one or more instrument and whether they are the instrument in question is the principal or secondary instrument. If Parliament had intended the exemption to apply to only one instrument or a specific instrument, then Parliament would have surely specified this clearly in s. 15(1).

[17] The House of Lords in *Saxone Lilley & Skinner (Holdings) Ltd v. Commissioner of Inland Revenue* [1967] 44 TC 122 commented that:

The Crown's main argument was that 'in use for the purposes of a trade' or of a part of a trade means wholly or mainly in use for such purposes. But that involves writing in words which are not there, and I can see nothing in the context to make that necessary. Moreover, it requires no feat of imagination in a draftsman to see that cases may arise where the same building or the same part of it is being used for two purposes, and if it were intended to exclude such cases I would expect that to be made clear …

[18] The above passage was approved by court in *Ketua Pengarah Hasil Dalam Negeri v. OKA Concrete Industries Sdn Bhd* (2015) MSTC 30-091 and *Clear Water Sanctuary Golf Management Berhad v. Ketua Pengarah Hasil Dalam Negeri* (2014) MSTC 30-075.

[19] It must be noted that the MOT is not a stand-alone instrument. It was executed pursuant to the SBA.

Conclusion

[20] Based on the above reasons, in my view there is no basis in law for the MOT to be assessed under *ad valorem* duty under item 32, First Schedule of SA. Therefore, this application is allowed with costs of RM1,000 to the plaintiff.